1996

Alta Health Strategies, Inc., a Delaware corporation v. CCI Mechanical Service, a division of CCI Mechanical, Inc., a Utah corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

ALTA HEALTH STRATEGIES, INC., a Delaware corporation, Plaintiff/Appellant, vs. CCI MECHANICAL SERVICE, a division of CCI Mechanical, Inc., a Utah corporation, Defendant/Appellee.	960331-CA Case No. ~~950512~~ Civil No. 930903151PD Priority No. 15

BRIEF OF APPELLANT

Appeal from the Third Judicial District Court,
Salt Lake County, Judge Leslie A. Lewis

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ALTA HEALTH STRATEGIES, INC., a Delaware corporation,	:	
Plaintiff/Appellant,	:	
vs.	:	
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	:	Civil No. 930903151PD
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STATEMENT OF APPELLATE JURISDICTION

Appellant seeks review of the directed verdict entered on November 3, 1995. The Utah Supreme Court has jurisdiction in this matter pursuant to § 78-2-2, Utah Code Ann. (1995).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Whether the trial court erred in granting a directed verdict for Defendant? The standard of appellate review:

(a) The evidence must be examined in the light most favorable to the losing party and, if this examination provides a reasonable basis in the evidence and inferences to support judgment in favor of the losing party, a directed verdict must be reversed.

(b) A directed verdict must be reversed unless, as a matter of law, reasonable minds could not differ on the facts.

(c) Where there is any evidence that raises questions of fact, no matter how improbable, judgment as a matter of law must be reversed.

Kleinert v. Kimball Elevator Co., 905 P.2d 297, 299 (Utah App. 1995); Gourdin v. Sharon's Cultural Educ. Rec. Ass'n, 845 P.2d 242, 243 (Utah 1992); Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 898 (Utah 1982); Nay v. General Motors Corp., 850 P.2d 1260, 1261 (Utah 1993); Anderson v. Gribble, 30 Utah 2d 68, 513 P.2d 432, 434 (1973).

Plaintiff alleged breach of contract or warranty and tort theories against Defendant. (R. at 2-10 and 193-203.) Plaintiff argued against and objected to entry of a directed verdict. (R. at 716-757.) Plaintiff objected to the proposed Findings of Fact, Conclusions of Law and Directed Verdict. (R. at 231-240.)

2. Whether there was evidence of Plaintiff's damages? The standard of appellate review and citation to the record showing the issue was preserved on appeal are the same as for paragraph 1.

3. Whether there was evidence that Plaintiff reasonably relied on the negligent misrepresentation by Defendant? The standard of appellate review and citation to the record showing the issue was preserved on appeal are the same as for paragraph 1.

DETERMINATIVE STATUTES, RULES AND REGULATIONS

Rule 50(a), Utah R. Civ. P., provides as follows:

> A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without the assent of the jury.

NATURE OF THE CASE

In 1993, Plaintiff filed this action to recover the damages it sustained when seven computer components were destroyed as the

result of high temperatures during an air conditioning failure on December 25, 1991. Defendant provided all service and maintenance for Plaintiff's air conditioning systems, including the computer room system that operated twenty-four hours a day, 365 days a year. Defendant installed an automatic backup system to automatically prevent the loss of air conditioning in the computer room.

In reliance on a conversation with Defendant, Plaintiff understood the backup system was operational on December 25 and, for the first time ever, did not require employees to continuously work in the computer room on Christmas. Plaintiff assigned employees to visit the computer room at hourly intervals. While the computer room was unattended, the air conditioning failed and the backup system did not automatically maintain air conditioning. More than seven computer components were destroyed by high temperatures. Defendant argued that Plaintiff knew that the auto backup project was incomplete and that Defendant never represented that the backup was fully operational.

On August 7 and 8, 1995, Plaintiff presented its case-in-chief. On the third day of trial, August 9, the trial court granted Defendant's motion for a directed verdict before Defendant began its case-in-chief or any jury deliberations.

STATEMENT OF FACTS

During 1991, Plaintiff provided health care management services to over a thousand customers. (R. at 442.) Russell Loudon was assigned direct responsibility for Plaintiff's computer room during 1991. (R. at 443.) Mr. Loudon was hired by one of Alta Health Strategies' predecessor companies in 1982. (R. at 352-353.) Mr. Loudon started in the computer room as a graveyard shift operator, but within three and one-half years Mr. Loudon had been promoted to manager of the computer room. (R. at 352 and 354.) Plaintiff's computer room was built at the same time that Plaintiff's building was constructed in approximately 1980. (R. at 355-356 and 373.) Mr. Loudon ceased his employment with Plaintiff in August of 1993. (R. at 362 and 441.)

Through 1991, Plaintiff obtained virtually all of its computer equipment from Unisys. (R. at 360 and 443.) Jim Bolinder, a Unisys service engineer, was primarily responsible for maintenance and upkeep of the computer systems and equipment. (R. at 357-358.) Mr. Bolinder worked the graveyard shift, since it was the only time acceptable to take the computer system down for maintenance. (R. at 358.) Unisys' responsibilities were computer maintenance, repair, and if Plaintiff was adding equipment, Unisys would tell Plaintiff what to actually purchase from Unisys. (R. at 359.) The

Unisys field engineers would perform daily maintenance under a service contract between Plaintiff and Unisys. (R. at 359.)

Plaintiff purchased increasing amounts of more sophisticated Unisys computer equipment as its business grew until, by 1991, Plaintiff had thousands of customer accounts on its computers. (R. at 355-356 and 361.) For many years through 1991, the Unisys computers operated twenty-four hours a day, fifty-two weeks a year. (R. at 356, 443 and 447.) Certain computer components were heat-sensitive and, therefore, the air conditioning operated twenty-four hours a day, 365 days a year. (R. at 402.) The target temperature for the computer room was a few degrees within 72 degrees. (R. 444.) Downtime was very critical to Plaintiff. (R. 409.) Mr. Loudon prided himself on having the computers running at least 98% of the time. (R. at 379-380.) One year the computers were up 99.2% of the time. (R. at 380.)

For many years prior to 1991, Plaintiff had assigned employees to work in the computer room twenty-four hours a day, fifty-two weeks a year. (R. at 427 and 444.) During 1991, Plaintiff experienced a number of computer failures that caused computer downtime. (R. at 367, 379, 402, and 428.) The most common computer failures were power outages that caused the loss of air conditioning (R. at 367, 379, 402-404, and 428.) Mr. Loudon and other managers decided to make the computers less vulnerable to air

conditioning failures. (R. at 379.) Plaintiff's goal was to minimize the downtime from power outages. (R. at 404.) None of Plaintiff's employees have experience, training or knowledge of air conditioning. (R. at 444 and 692-693.) For the ten years up to 1991, all air conditioning service and maintenance work for Plaintiff's computer room was performed by Defendant. (R. at 357, 444, 647, and 693.) While Defendant worked on the computer room air conditioning, Plaintiff would communicate with Defendant informally, the employees usually talked to each other in the hall or in one of the offices. (R. at 450.) There were no special meetings or written records between the parties during the switchover project and the customary practice in the years up to 1991 was that Defendant did not have meetings with Plaintiff or send documents back and forth. (R. at 451.)

Mr. Loudon asked whether Defendant could install an automatic backup for the computer room air conditioning system. (R. at 377 and 381-382.) Defendant represented that it could design and build an auto backup system. (R. at 377.) Mr. Loudon did not know how the auto backup system would work until after it failed in December of 1991. (R. at 384-385.) Defendant admitted that it knew that Plaintiff did not have any employees that were knowledgeable and experienced in air conditioning. (R. at 592.) Defendant knew

Plaintiff was relying on Defendant for the automatic backup work. (R. at 591.)

In 1991, Defendant prepared a Proposal-Contract for the air conditioning auto backup for the computer room. (Ex. 5.) The project to design and install an automatic switchover system was called the changeover. (Ex. 5.) Defendant agreed to charge $6,650 for the changeover project. (Ex. 5.) The switchover project was started by Defendant near the end of 1991. (R. at 445.) There was a second and larger project by Defendant to replace one of Plaintiff's air conditioning chillers underway at the end of 1991. (R. at 445 and 571-572.) Mr. Loudon was primarily responsible for the auto backup project performed by Defendant. (R. at 418.) Prior to December 25, Mr. Loudon understood the switchover project was nearly finished by Defendant, because the project was supposed to have automatically switched over on December 25 and all that remained was installation of indicator lights. (R. at 437.)

In the past, for every holiday, Plaintiff had always assigned computer operators to work, including Christmas day. (R. at 408 and 447.) Before December 25, Mr. Loudon asked his supervisor, Kent Broadhead, whether he could give the computer room operators time off for Christmas. (R. at 362, 408, and 447.) Mr. Broadhead had been the computer room manager before his promotion to director. (R. at 440.) After Plaintiff had experienced a number

of air conditioning failures, Mr. Broadhead had asked that an automatic switchover be installed to avoid any manual intervention should an air conditioning failure occur in the computer room. (R. at 445-446.) Mr. Broadhead agreed that computer operators could have time off on Christmas, if the switchover project allowed the computer room to be unmanned. Mr. Loudon confirmed this with Defendant, and agreed to monitor the computers at regular intervals throughout the day. (R. at 408, 447, and 449.) Mr. Broadhead met and confirmed with Mr. Loudon three separate times that the auto switchover was working before leaving the computer room unmanned on December 25. (R. at 451 and 508.)

Defendant would talk to Mr. Loudon two to three times per week about the two air conditioning projects. (R. at 413.) Nevertheless, Mr. Loudon did not really have a good understanding of the mechanism of the switchover. (R. at 413.) Mr. Loudon did understand that the air conditioning would switch over if there was a problem. (R. at 408.) The only instructions Mr. Loudon had from Defendant were that the changeover would switch over in the event of a failure and the operators only had to observe a panel with indicator lights, but this light panel would not be finished until later. (R. at 413-414, 423 and 437.) In the computer room conversation with Defendant, Mr. Loudon did not recall any mention of the mechanical or electrical mechanisms of the switchover. (R.

at 415.) Mr. Loudon did not recall the computer room conversation, but he certainly understood that the changeover would switch over. (R. at 432.)

Relying on his conversation with Defendant, Mr. Loudon gave the computer operators part of Christmas day off. (R. at 408, 412 and 414.) The employees were allowed to leave the computer room unmanned, but operators were required to visit the computer room at hourly intervals on December 25. (R. at 408 and 414.) Mr. Loudon could not recall being told that the changeover would switch over until or unless there was a power hit, since upon mention of power hits Mr. Loudon would have felt uncomfortable not having the room staffed where power hits were the most common problem. (R. at 427.) Defendant's employee could not recall whether he told Plaintiff that the switchover would work except for power failures. (R. at 579.)

Mr. Loudon arrived at the computer room shortly before 4:00 p.m. on December 25, 1991. (R. at 407.) Mr. Loudon discovered that there had been an air conditioning failure, since the room was at 95-96 degrees and the computer alarms, whistles and lights were activated. (R. at 367, 372, 407, and 422-423.) Mr. Loudon first called and requested emergency service from Defendant. (R. at 409.) By the time Defendant arrived, the air conditioning was operating. (R. at 410.)

Jim Bolinder was dispatched by Unisys to the computer room on December 25 for fatal system errors from over-temperature problems. (R. at 614.) Mr. Bolinder's notes showed that the temperature in the computer room went up to 95 degrees. (R. at 617.) At least five HDAs were having problems on December 25, but Mr. Bolinder got the computers up and running. (R. at 617-618.) On December 26, Mr. Bolinder found three HDAs in the computer room had crashed or had fatal errors. (R. at 618.) In Mr. Bolinder's opinion the high temperatures on December 25 caused the excessive number of HDA failures. (R. at 640-642.)

Trial Exs. 2 and 3 were the customer service orders written up by the service engineers to specifically bill Plaintiff for service or repair. (R. at 614.) Mr. Bolinder wrote up Ex. 2 for the December 25 service call, since it was outside of the maintenance agreement between Plaintiff and Unisys. (R. at 615.) Plaintiff was charged $933.46 for the services performed by Mr. Bolinder on December 25. (R. at 616.) Ex. 3 was the customer service order for a service call on December 29 for two HDAs that required maintenance. (R. at 616.) The amount charged to Plaintiff for the work in Ex. 3 was $673.50. (R. at 616.)

David English was employed by Plaintiff as the director of facilities, planning and support from 1989 to 1995. (R. at 644.) Mr. English signed trial Ex. 5, Defendant's Proposal-Contract, for

the auto switchover system project. (R. at 646.) Mr. English supervised the air conditioning for Plaintiff's buildings, but not Plaintiff's computer room. (R. at 645.) Mr. Broadhead was in charge of the computer room in 1991. (R. at 645.) Mr. Loudon was in charge of making sure that the work on the switchover system described in Ex. 5 was completed. (R. at 647.) Mr. English regularly worked with Defendant's service employees assigned to work on Plaintiff's air conditioning. (R. at 648-649.) Mr. English did not have a detailed understanding of the switchover system. (R. at 651-652.)

Before Mr. English left for a week of Christmas vacation, there was a systems failure and the changeover did not switch over. (R. at 653-654.) Mr. English asked one of Defendant's two service employees the reason that the changeover had not automatically switched over and the employee told Mr. English the switchover was 95 to 99% finished, but Defendant was waiting for an electronic part. (R. at 654.) Mr. English had the discussion with Defendant's employee in the hall right outside Mr. Broadhead's office. (R. at 654.) Mr. Broadhead was in a meeting at the time of the discussion. (R. at 654.) Mr. English said "are you waiting to see Kent [Broadhead], or do you want me to go in with you to talk to Kent?" (R. at 654.) The employee said he would stay and talk to Mr. Broadhead and, therefore, Mr. English left. (R. at

654.) Mr. Broadhead was never told by Defendant before December 25 that the auto switchover was not working. (R. at 450-451 and 461-462.)

Mark Bryner has been an electrical and mechanical engineer for nearly fifty years. (R. at 664-666.) Mr. Bryner reviewed all available drawings and diagrams and investigated Plaintiff's air conditioning, including the auto switchover system. (R. at 670.) Mr. Bryner explained that one of the two main parts of the auto switchover was the restart element. (R. at 681.) The restart was a push button before 1992, but after 1992 the restart was automatic once Defendant merely connected two wires or made a "jumper." (R. at 682-683.) There was no mechanical or electrical engineering reason to wait to make the restart automatic; it could have been done on the first day of the project. (R. 685.) The old and new indicator-light panels were not necessary for the auto restart. (R. 686.) The indicator panel had nothing to do with either the restart or changeover parts of the switchover system. (R. at 691.)

Dale Brown was the Unisys employee responsible for Plaintiff's sales account. (R. at 523-524.) Mr. Brown was involved in the replacement of Unisys computer equipment after Christmas 1991. (R. at 528.) Unisys head disk assemblies ("HDAs") were components of Plaintiff's computer system. (R. at 526.) An HDA is an assembly of aluminum platters that store information that

has been processed and generated by the computer. (R. at 388 and 459.) An HDA is not generically different from a disk drive. (R. at 526.) The Unisys HDAs in Plaintiff's computer system were not designed to operate where temperatures exceeded 90 degrees or temperatures increased by more than five degrees per hour. (R. at 621-622.) Within one day, three HDAs had crashed from high temperatures. (R. at 428.) Seven to nine HDAs were damaged and replaced by Unisys within one month of December 25. (R. at 459, 508, and 619-620.) Unisys repaired some of the HDAs. (R. at 529.) The loss of air conditioning on December 25 caused excessive temperatures that damaged HDAs and the HDAs had to be replaced. (R. at 400.)

Under the maintenance contract between Plaintiff and Unisys, if an HDA failed and was damaged, within the terms of the agreement, Unisys replaced the HDA at its cost. (R. at 398 and 470.) There was really no difference between the service agreement and a warranty agreement. (R. at 553.) Unisys had replaced HDAs that failed during the months preceding December 25, 1991 free-of-charge each and every time. (R. at 532 and 553.) Unisys replaced two of the nine damaged HDAS at its own expense or under warranty. (R. at 460 and 620.) The reason Unisys replaced two of the damaged HDAs at its own expense or under warranty was that any HDAs that had not logged any errors in the thirty days before December 25

would have been damaged by heat. (R. at 460.) Only two HDAs had logged errors before December 25 that were replaced by Unisys at its own expense. (R. at 460.)

Of the approximately 150-200 HDAs in the Unisys computer room on December 25, one-half to two-thirds were the middle-aged model, No. 9494-24. (R. at 531, 533, and 613.) There were approximately twenty-four of the newest HDA model No. 9730. (R. at 535, 538, and 613.) For many years, Plaintiff had continually purchased and installed the newest and most advanced models of computer equipment from Unisys. (R. at 360-361 and 525.) Plaintiff tried to stay on the leading edge of computer equipment and, when Mr. Loudon was terminated, the newest Unisys computer used by Plaintiff was one of only sixteen in the world. (R. 361.) Plaintiff would be one of the first to buy new Unisys HDAs as the latest version came out. (R. at 361 and 527.)

The middle-aged HDAs, No. 9494-24, were larger, slower, and more expensive than the newest model 9730 HDA. (R. at 525 and 534-535.) The seven 9494-24 HDAs damaged on December 25 were not replaced with identical 9494-24 HDAs. (R. at 459.) The two 9494-24 HDAs replaced free-of-charge by Unisys were replaced with identical new 9494-24 HDAs. (R. at 620.) Plaintiff replaced the seven 9494-24 HDAs with the comparable space on the newest model HDA. (R. at 459.) The 9730 HDA was roughly half as expensive as

the older 9494-24. (R. at 535.) Plaintiff saved considerable expense by purchasing the five smaller, faster, and cheaper No. 9730 HDAs to replace the seven failed 9494-24 HDAs not replaced free-of-charge by Unisys. (R. at 529, 531 and 534-535.) Mr. Brown was aware of the decision by Unisys not to pay for replacement of the five HDAs following Christmas 1991. (R. at 530.) Unisys did charge Plaintiff for the HDAs damaged on December 25, but Mr. Brown did not know what happened to the HDAs that were removed. (R. at 555.)

Mr. Brown received two orders from Mr. Broadhead for 9730 or 9613 HDAs within one week of each other. (R. at 536.) Plaintiff ordered replacement equipment from Mr. Brown that would have been delivered within thirty days. (R. at 557) Trial Ex. 7 was an order for five HDAs dated January 16, 1992. (R. at 536.) Ex. 7 was for five of the newest model HDAs to replace the middle-aged HDAs that were deemed unrepairable after the Christmas air conditioning failure. (R. at 537.) The unit price for the replacement HDAs was $22,706. (R. at 539.) Plaintiff's discount price for each of the five HDAs was $19,300. (R. at 539.) Mr. Brown did not recall any unusual price considerations given to Plaintiff to buy the newest model. (R. at 557-558.) Mr. Brown's only price for the 9730 HDAs was $19,300. (R. at 547.) The total order at the discount price in Ex. 7 was $96,300. (R. at 539.)

Trial Ex. 8 was an order for two HDAs dated January 21, 1992. (R. at 540.) Ex. 8 was for two of the newest model HDAs. (R. at 540.) The discount price was $19,300 per HDA and the total price for the two HDAs was $38,600. (R. at 540.) Both orders were shipped to Plaintiff. (R. at 539-540) It took seven of the newest model HDAs to replace the five failed middle-aged HDAs. (R. at 542.) Plaintiff's approximate cost to replace the seven damaged HDAs with the five newest models was $119,000. (R. at 460-461.) Mr. Brown approved the decision to charge Plaintiff for transportation, but not labor and installation. (R. at 530-531 and 547.)

Trial Ex. 6 was a letter dated December 26, 1991, from Unisys to Plaintiff. (R. at 543.) In Ex. 6, Unisys described that on December 25 the customer service engineer noted that the temperature in the computer had reached 95 degrees. (Ex. 6.) Unisys understood that these extreme environmental conditions were due to an air conditioning malfunction in the computer room. (Ex. 6.) Unisys explained that hardware failures were not instantaneous from environmental shock, but already three 9494-24 HDAs had failed. (Ex. 6.) Unisys expressly informed Plaintiff that because the failure was environmental and not within the control of Unisys "the repair or replacement of the damaged hardware is beyond the scope of your Unisys Maintenance Agreement." (Ex. 6.) "The cost

to replace or repair the units will be the responsibility of Alta Health." (Ex. 6.) The HDA order in Exs. 6, 7, and 8 was the only event where Unisys has charged any customer for the replacement of HDAs. (R. at 561.)

SUMMARY OF ARGUMENTS

1. The trial court failed to examine Plaintiff's evidence and the inferences from the evidence in the light most favorable to Plaintiff. The directed verdict cannot be sustained where there is any evidence that raises a question of material fact, no matter how improbable, the evidence may appear. Plaintiff presented testimonial and documentary evidence of its damages and the reasonableness of its reliance on Defendant's negligent misrepresentation.

2. Plaintiff's evidence of damages was not speculative. Plaintiff proved that nine heat-damaged computer components were replaced with seven new-model components at a discount price of $134,900.00. Installation of the seven new-model components saved Plaintiff at least $100,000.00 from the cost of replacement of the destroyed components with the same middle-aged models. Thus, Plaintiff presented a rational basis to allow the jury to make a reasonable estimate of Plaintiff's damages. Moreover, Plaintif was not required to prove payment and would be entitled to nominal damages regardless of any insufficient proof of actual damages.

3. The testimony by Plaintiff's employees that Defendant negligently misrepresented that the air conditioning system was fully automatic was not contradicted by Defendant at trial. Plaintiff's reliance on Defendant's representation was reasonably foreseeable, since Defendant knew that Plaintiff had no air conditioning expertise, Defendant had performed all air conditioning service and maintenance for ten years, communication between the parties had always been informal, and Defendant had to be accurate in statements to Defendant as a commercial air conditioning contractor. Whether Plaintiff's reliance was reasonable is a prototypical jury question.

ARGUMENT I
WHEN THE EVIDENCE AND ALL INFERENCES ARE EXAMINED, IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, A QUESTION OF FACT, EVEN IF IMPROBABLE, WAS RAISED BY PLAINTIFF CONCERNING DAMAGES AND NEGLIGENT MISREPRESENTATION

The trial court prevented any issues from going to the jury and entered judgment as a matter of law. A directed verdict should be used cautiously and sparingly. A well-recognized alternative for a trial court concerned with the sufficiency of a party's evidence of damages is to allow the case to go to the jury, but grant a judgment notwithstanding the verdict ("J.N.O.V.") if the jury awards speculative or uncertain damages.

The most recent decision involving entry of a directed verdict is Kleinert v. Kimball Elevator Co., 905 P.2d at 297. The

plaintiff claimed permanent injuries from an elevator that trapped plaintiff and allegedly threw the plaintiff up and down for forty minutes. The supreme court reversed the entry of the directed verdict in favor of the building owner. The plaintiff's claim against the owner was based on failure to repair. Hence, plaintiff had the burden to show that the owner knew or should have known that a dangerous condition existed and the owner had sufficient time to take corrective action. Id. at 300. The supreme court restated the appellate standard of review for a directed verdict:

> On appeal from a directed verdict, "we must examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party, the directed verdict cannot be sustained." Gourdin v. Sharon's Cultural Educ. Rec. Ass'n, 845 P.2d 242, 243 (Utah 1992) (quoting Graystone Pines, 652 P.2d at 898). Where there is any evidence that raises a question of material fact, no matter how improbable the evidence may appear, judgment as a matter of law is improper. See Hill v. Seattle First Nat'l Bank, 827 P.2d 241, 246 (Utah 1992).

Id. at 299.

Plaintiff's evidence of prior elevator problems consisted of the testimony of two employees of the elevator company, several persons who had been trapped in the elevator before plaintiff's injury, and copies of service records that showed numerous malfunctions. The court, without making any conclusion as to the weight and veracity of the evidence, concluded that the evidence

was sufficient to raise a genuine question of material fact when viewed in a light most favorable to plaintiff. Id. at 300.

Similarly, in Nay v. General Motors Corp., 850 P.2d at 1260, the court reversed a directed verdict in favor of the manufacturer of an allegedly defective vehicle. The testimony of the plaintiffs' experts, when all facts and inferences from the facts were viewed in the light most favorable to plaintiffs, established a specific theory of the defect and causation of the vehicle crash. "We refuse to prevent these issues from going to the jury when, as here, there is any evidence upon which a reasonable jury could infer causation." Id. at 1264 (citing Butterfield v. Okubo, 831 P.2d 97, 106 (Utah 1992)).

In this case, when the evidence and all inferences from the evidence are viewed in the light most favorable to Plaintiff, the testimony and exhibits prove that Plaintiff was damaged and that Plaintiff reasonably relied on Defendant's misrepresentation that the auto switchover was operable.

For example, in the findings of fact, the trial court conceded that the computer components had to be replaced and that these components were damaged by high temperatures on December 25. Thus, where there was any evidence presented by Plaintiff on the amount of damages, no matter how improbable the evidence may appear, Plaintiff was entitled to have the jury consider Plaintiff's claims

for damages. Similarly, upon admission of any evidence of the reasonableness of Plaintiff's reliance on Defendant's misrepresentation that the switchover was automatic, no matter how improbable the evidence appeared, Plaintiff was entitled to go to the jury. Defendant knew that Plaintiff had no experience in air conditioning and, for ten years, had completely relied on Defendant for all air conditioning service and maintenance. For ten years the parties communicated informally with each other in the hall or offices without special meetings or transmission of documents back and forth. Mr. Loudon relied on the conversation that the auto switchover system was working on December 25. Defendant's employee knew, one week before Christmas, that Plaintiff understood the auto switchover was fully operational, but Defendant did not take precautions or make efforts to communicate the progress of the auto switchover system. Indeed, Defendant's employee never advised Plaintiff that the switchover was partially inoperable.

ARGUMENT II
THE TRIAL COURT ERRED WHEN IT CONCLUDED, AS A MATTER OF LAW, THAT PLAINTIFF HAD NOT OFFERED ANY EVIDENCE IN ALLOWING A REASONABLE ESTIMATE OF DAMAGES

Plaintiff proved its damages with reasonable certainty and with sufficient evidence to ensure that the jury would not have to resort to speculation. The evidence showed the amount of damages and that Plaintiff's damages were caused by Defendant. Plaintiff is entitled to recover full compensation for the losses it

incurred. The trial court erred when it concluded as a matter of law that plaintiff failed to introduce sufficient evidence for a jury to determine damages.

In Price-Orem v. Rollins, Brown & Gunnell, 784 P.2d 475 (Utah App. 1989), the defendant objected to admission of an appraisal that used estimated income, not actual income. Defendant claimed plaintiff's evidence of income was insufficient to support the jury verdict of damages. The court held that the estimated income "evidence was not too speculative to support the damage award." Id. at 479.

The court described the requisite proof to recover damages:

> The objective in rendering an award of damages is to award the injured party full compensation for actual losses incurred, see Henderson v. For-Shor Co., 757 P.2d 465, 469 (Utah Ct. App. 1988), by evaluating any loss "suffered by the most direct, practical and accurate method that can be employed." Even Odds, Inc. v. Nielson, 22 Utah 2d 49, 448 P.2d 709, 711 (1968). It is well settled that, although the plaintiff has the burden of proving the fact, causation, and amount of damages, he need only do so with reasonable certainty rather than with absolute precision. Canyon Country Store, 781 P.2d at 418; Sawyers v. FMA Leasing Co., 722 P.2d 773, 774 (Utah 1986) (per curiam); Anderson v. Bauer, 681 P.2d 1316, 1323-25 (Wyo. 1984). "[A]lthough damages may not be determined by speculation or guesswork, evidence allowing a just and reasonable estimate of the damage based on relevant data is sufficient." National Steel Co. v. Great Lakes Towing Co., 574 F.2d 339, 342 (6th Cir. 1978).

Id. at 478.

The court concluded that the amount of damages may be based on mere approximations, since "the level of certainty required to

establish the amount of loss is generally lower than that required to establish the fact of loss...." Id. at 479 (citing Sampson v. Richins, 770 P.2d 998, 1007 (Utah App. 1989)); see also Broadway Realty & Trust, Inc. v. Gould, 136 Ariz. 236, 665 P.2d 580, 582 (Ariz. App. 1983) (once the right to damages was established, uncertainty as to the amount will not preclude recovery).

The supreme court reached a similar result in Bastian v. King, 661 P.2d 953 (Utah 1983). The defendant contended that the damages from defendant's trespassing cattle were so speculative that there was no rational basis in the evidence to support an award of $2,966 to plaintiff for damaged crops. The case was remanded for further findings, since the court was unable to determine how the trial court calculated the value of the destroyed crops. Id. at 957. The supreme court ruled that speculative damages would be reversed, but the general rule was that "some degree of uncertainty in the evidence of damages will not suffice to relieve a defendant from recompensing a wronged plaintiff." Id. at 956. The court concluded as follows:

> As long as there is some rational basis for a damage award, it is the wrongdoer who must assume the risk of some uncertainty. Winsness v. M.J. Conoco Distributors, Utah, 593 P.2d 1303 (1979). Where there is evidence of the fact of damage, a defendant may not escape liability because the amount cannot be proved with precision.

Id. (citations omitted).

Plaintiff proved the fact, causation, and amount of damages by the most direct, practical, and accurate method. Plaintiff established the fact of loss through the testimony of a number of witnesses and exhibits. First, the undisputed testimony of the responsible Unisys engineer, corroborated by Mr. Loudon, was that the high temperatures on December 25 caused the damage to the middle-aged HDAs. Second, the testimony of the employees of Unisys and Plaintiff, including written service orders, shows that nine heat-damaged HDAs were replaced with seven of the newest-model HDA. All witnesses agreed that the replacement HDAs were shipped to Plaintiff. Indeed, the trial court's findings of fact concede that HDAs had to be replaced after high-heat damage. Finally, there can be no argument that Plaintiff was charged for service on HDAs damaged by heat and that the charges were outside the parties' maintenance agreement.

Disputed evidence concerning the amount of Plaintiff's loss is part of the findings of fact. The trial court found no evidence that $19,300 per HDA charged by Unisys was a reasonable price, that price considerations were unspecified, and that there was no evidence of the fair market value of the nine middle-aged HDAs damaged by heat. However, these findings involving the amount of damages are subjected to a lower standard of proof. Approximations based on relevant data are allowed as long as the proof of the

amount does not amount to speculation or guesswork. Plaintiff's proof of damages did not amount to speculation or guesswork. The opinions of Plaintiff's damages were just and reasonable estimates based on relevant data.

There was no dispute that Plaintiff was charged $1,606.96 in two Unisys customer service orders for service on heat-damaged HDAs. These service charges were not free-of-charge or under warranty, since the work was outside the parties' maintenance agreement. Plaintiff received a discount price on each new-model HDA that was $3,400 less expensive than the regular unit price. In addition, the installation of the newest-model HDA saved an enormous sum in replacement costs. The newest-model HDA was roughly one-half as expensive as the middle-aged HDAs destroyed by high temperatures. Thus, replacement of the destroyed HDAs with the newest-model HDAs saved Plaintiff at least $100,000.

The two orders by Plaintiff for seven new-model HDAs showed that Unisys charged Plaintiff $134,900 for replacement HDAs at the discount price. Unisys shipped the orders to Plaintiff and Plaintiff was responsible for transportation expenses. Unisys employees testified that the discount price was the only price Unisys had for the newest-model HDAs. Unisys employees testified there were no other price considerations given to Plaintiff. Unisys replaced two other destroyed HDAs at its own expense.

Unisys had replaced all HDAs that failed in the years before 1992. The seven new-model HDAs were not replaced by Unisys free-of-charge or under warranty. Unisys sent Plaintiff a written explanation of why Unisys did and, for the first time, required Plaintiff to pay for the damaged components. Unisys stated that the high-heat destruction was not within the control of Unisys and the damage was beyond the scope of the maintenance agreement. Consequently, replacement of the failed equipment was the sole responsibility of Plaintiff. The December 25 air conditioning failure was the only event where Unisys charged any customer for replacement HDAs.

Plaintiff had to replace HDAs after Plaintiff's wrongful and negligent conduct caused the computer room to be unmanned during an air conditioning failure. The undisputed evidence that Plaintiff replaced the destroyed HDAs is sufficient to subject Defendant to liability regardless of any imprecision concerning the amount of damages. Plaintiff is entitled to seek full compensation from the jury for actual losses shown with just and reasonable estimates.

Plaintiff was entitled to seek nominal damages under its breach of contract claims regardless of whether it proved actual damages. Plaintiff sought to recover damages for Defendant's breach of contract or warranty and for negligent misrepresentation. In the event Plaintiff failed to prove actual damages, Plaintiff

was entitled to seek nominal damages from Defendant under its breach of contract or warranty claims.

In Fashion Place Assocs. v. Glad Rags, Inc., 754 P.2d 940 (Utah 1988), the tenant breached a commercial lease. The trial court awarded the landlord damages for the lost rent during the fifteen months the premises were vacant. On appeal, the court held that the premises had been relet at a rate double defendant's rent and, under the terms of the lease, defendant's liability was zero. "However, nominal damages are recoverable upon a breach of contract if no actual damages resulted from the breach." Id. at 942 (citing Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667 (Utah 1982)); see also Snyderville Transp. Co. v. Christiansen, 609 P.2d 939, 943 (Utah 1980) (juries may award nominal damages if plaintiff fails to prove damages).

Assuming that Plaintiff failed to prove actual damages, the claims for breach of contract or warranty would entitle Plaintiff to seek nominal damages from Defendant. Hence, the alleged failure to prove damages is not a proper ground for dismissal of a case by directed verdict. Of course, the charges for two service calls by Unisys to repair failed equipment proved actual damages of at least $1,606.96. In addition, the trial court's findings of fact expressly concede that five to seven HDAs required replacement from the high temperatures. Plaintiff was charged for two orders of

replacement HDAs shipped by Unisys to Plaintiff in the total sum of $134,900. For all prior HDA failures, Unisys had always replaced the HDAs free-of-charge. However, Unisys refused to pay for replacement of the HDAs destroyed by high heat on December 25.

One of the trial court's findings of fact, No. 11, provides that Plaintiff produced no evidence establishing that Plaintiff ever paid for the replacement HDAs. Plaintiff is not required to prove payment to recover damages. Indeed, Plaintiff does not even have to buy replacement HDAs to recover damages, so long as Plaintiff does not fail to mitigate its damages. Failure to mitigate cannot be an issue in this case, since Plaintiff saved $100,000 by purchasing new-model HDAs. Plaintiff is only required to prove the fact that a loss occurred as a result of Defendant's wrongdoing and the amount of the loss. Additionally, there are no Utah decisions that make proof of payment a requisite element of damages in a breach of contract or warranty case.

In Barilla v. Gunn Buick-Cadillac-GMC, Inc., 139 Misc.2d 496, 528 N.Y.S.2d 273 (City Ct. 1988), the court ruled that the plaintiff may recover the costs to repair a defective vehicle from the dealer that sold the used car under a statutory warranty of serviceability. The plaintiff's repair costs were $1,075.87, since "plaintiff was and is liable to pay that amount although she has apparently not yet done so." Id. at 280. The court was unaware

"of any requirement that prior to recovering a judgment, a plaintiff must actually pay the bills that are the subject of the lawsuit." Id. "Indeed persons, sometimes indigent, frequently recover awards for past and even future anticipated expenses which they have not paid and sometimes cannot pay, and they recover their judgment." Id.

In Coe v. Esau, 377 P.2d 815 (Okl. 1963), a service station owner-operator destroyed plaintiff's automobile engine by installation of a faulty oil-filter gasket. The proper measure of damage for defendant's negligence was the cost of repair. However, the plaintiff traded in the car with the damaged motor when he acquired another vehicle. Plaintiff's car was not repaired and the court held that it was "'not a condition precedent to recover for items of damage for repairs that plaintiff should have actually expended the sums of incurred liability therefor.'" Id. at 820-21 (quoting Missouri Pac. R. Co. v. Qualls, 120 Okl. 49, 250 P. 774 (1925)).

Similarly, in Hughes v. New Orleans Pub. Serv., Inc., 485 So. 2d 642 (La. App. 4 Cir. 1986), the trial court awarded plaintiff damages for mental suffering and repair costs for her car from burning debris dropped by a transformer that exploded. Defendant argued that the plaintiff must first repair her car before she was entitled to recover a damage award. Id. at 643. The court held

that "[a]n estimate of the cost of repair will support an award of damages; it is not necessary that the damaged property be actually repaired." Id. (citations omitted).

There are no Utah cases that make proof of payment a requisite element of damages in a tort action. Of course, the custom and practice in personal injury cases is to offer evidence of all medical bills as proof of the amount of special damages. In personal injury actions, when medical bills have been paid, the jury is not advised of payment as required by the collateral source rule. DuBois v. Nye, 584 P.2d 823, 825 (Utah 1978). Generally, no evidence that medical bills are paid or unpaid is ever offered at trial by the parties. Of course, the amount paid may be some evidence of the reasonable value of medical expenses. Lawson v. Safeway, Inc., 878 P.2d 127, 131 (Colo. App. 1994).

Plaintiff was not required to offer evidence it paid Unisys for the replacement HDAs to prove the fact of loss or amount of damages. Whether or not Unisys has yet been paid makes not difference in Plaintiff's right to recover damages from Defendant. Plaintiff replaced nine HDAs, but the burden of proving damages did not prescribe that Plaintiff even replaced the damaged equipment. Nor did Plaintiff have to offer testimonial or documentary evidence of payment, including canceled checks, receipts, or other bank records to prove payment. In the event Unisys did not obtain

payment for the HDAs it shipped and installed for Plaintiff, for whatever reason, Plaintiff should not be precluded from recovery of damages caused by Defendant.

ARGUMENT III
WHETHER PLAINTIFF REASONABLY RELIED ON DEFENDANT'S MISREPRESENTATION WAS A PROTOTYPICAL QUESTION OF FACT FOR THE JURY

The trial court's other erroneous conclusion of law was that Plaintiff failed to introduce sufficient evidence to allow the jury to find that the Plaintiff had "reasonably relied" upon Defendant's negligent misrepresentation. There is no dispute that Defendant made a misrepresentation to Plaintiff. All of Plaintiff's employees testified that Defendant represented to Plaintiff that the auto switchover was working on December 25. By contrast, Defendant's responsible employee could not recall if he represented to Plaintiff that the auto switchover was completely operable. Whether Plaintiff's reliance on Defendant's misrepresentation was reasonable is question of fact for a jury.

In Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, 713 P.2d 55 (Utah 1986), the court reversed the dismissal of plaintiff's claim against the engineering firm that had negligently staked the shopping center developed by plaintiff. The doctrine of negligent misrepresentation was described as follows:

> [T]he tort ... provides that a party injured by reasonable reliance upon a second party's careless or negligent misrepresentation of a material fact may recover damages resulting from that injury when the second party had a pecuniary interest in the transaction, was in a superior position to know material facts, and should have reasonably foreseen that the injured party was likely to rely upon the fact.

Id. at 59 (citations omitted).

Defendant was hired to survey and stake the property and "was bound to do so with that degree of care and skill expected of licensed surveyors and/or engineers." Id. The professional expertise of the defendant entitled others to "reasonably rely" upon the project engineer's information. Id. at 59-60. Plaintiff "as the owner of the property for whose benefit the shopping center was being constructed, was clearly a party whose justifiable reliance upon the accuracy of the survey might be reasonably foreseen." Id. at 60.

Similarly, reversal of Plaintiff's directed verdict is mandated in this case. Defendant was bound to perform the switchover project with the degree of care and skill expected of a commercial air conditioning contractor. Defendant's ten years of performance of all Plaintiff's air conditioning service and maintenance and Defendant's professional expertise entitled Plaintiff to reasonably rely on Defendant's statements concerning the switchover project. Defendant knew Plaintiff had no experience in air conditioning and Plaintiff, as the owner, was clearly a

party whose justifiable reliance upon the accuracy of statements that the auto switchover was working was reasonably foreseeable.

In a recent decision, the court further interpreted the element of reasonable reliance in Maack v. Resource Design & Constr., Inc., 875 P.2d 570 (Utah App. 1994). The plaintiffs appealed the dismissal of their claims against the seller's real estate agent, Kesselring, who had represented that the residence purchased by plaintiffs had a one-year builder's warranty. The court relied on the Price-Orem factors to find that Kesselring's statement to plaintiffs was a misrepresentation, Kesselring had a pecuniary interest in the transaction, and Kesselring was in a superior position to know material facts. Id. at 576. "The key question, however, is whether the Maacks' reliance on Kesselring's misrepresentation was **reasonable.**" Id. (emphasis in original).

The court of appeals noted that the supreme court has only required proof of reasonable reliance, not due diligence, as an element of negligent misrepresentation. Id. at 577 (citing Price-Orem, 713 P.2d at 59). The court explained that in Schuhman v. Green River Motel, 835 P.2d 992 (Utah App. 1992), the court of appeals had criticized the requirement of due diligence in a negligent misrepresentation claim, since "the supreme court had required only reasonable reliance." Id. at 577 n. 5. The court conceded that due diligence may be a higher standard of proof than

reasonable reliance. Id. "However, they both impose some standard of care on one claiming to be a victim of misrepresentation." Id. The court held that to bring a successful negligent misrepresentation claim plaintiffs must demonstrate that their "reliance on Kesselring's statement without some further investigation was reasonable under the circumstances." Id. at 577.

The court affirmed that plaintiffs' negligent misrepresentation cause was properly dismissed by summary judgment. Id. The court concluded that plaintiffs did not reasonably rely on the Kesselring's statement where plaintiffs failed to ask the scope of coverage under the warranty, did not review the warranty, did not refer to the warranty in the purchase agreement, did not inquire as to the expiration date, and plaintiff was an experienced attorney who should have known the terms of an "as is" sale. Id.

In this case, Plaintiff had no employees with experience or knowledge of air conditioning. Defendant had a strong pecuniary interest in the switchover project and was in a position where it had exclusive knowledge concerning the status and nature of the work. Proof of due diligence was unnecessary for Plaintiff to recover damages. Plaintiff must merely prove that Mr. Loudon's reliance on Defendant's representation that the auto switchover was operable was reasonable and required no further investigation. Mr. Loudon relied on Defendant's misrepresentation that the switchover

was operational. Plaintiff's reliance, without further investigation, was reasonable where Plaintiff had relied on informal conversations with Defendant during the preceding ten years of air conditioning service and maintenance. Additionally, Mr. English investigated the switchover a week before December 25, after he was surprised to learn that the project was unfinished, and Mr. English was told by the Defendant that the project was 95 to 99 percent complete. Mr. English asked wheher he should advise Messrs. Broadhead or Loudon that the auto switchover was partially inoperable, but Defendant reassured Mr. English that the computer room management would be informed that the switchover would not work during power outages. Defendant never explained to computer room managment that the switchover would not work during power outages. Mr. Loudon relied on the informal conversation with Defendant concerning the progress of the air conditioning project just as he had for many years prior to December 1991.

CONCLUSION

Plaintiff's evidence of damages was not so imprecise that the jury would have been required to speculate or guess. Plaintiff offered sufficient evidence that Plaintiff incurred $134,900.00 in damages and $1,606.96 for service work to replace the nine HDAs

destroyed from high-heat on December 25, 1991. Indeed, Plaintiff's evidence was that it saved $100,000 by ordering seven of the newest-model HDAs to replace the nine destroyed HDAs.

Plaintiff relied on the accuracy of Defendant's representation that the automatic switchover was fully operational. Plaintiff's reliance was probable and reasonably foreseeable. Plaintiff had relied on Defendant's statements concerning service and maintenance work for many years before December 25, 1991. Defendant knew that Plaintiff did not have any expertise in air conditioning. Defendant was expected to make representations in accordance with the degree of care and skill expected of a commercial air conditioning contractor. Defendant knew that Plaintiff did not understand that the auto switchover was fully operable a week before December 25, 1991, yet assured Plaintiff that Defendant would keep the computer room management informed of the progress of the work.

When Plaintiff's evidence of damages and reliance on Defendant's negligent misrepresentation is examined, in the light most favorable to Plaintiff, the directed verdict was improperly granted. Plaintiff raised questions of material fact, no matter how improbable, that should have been considered by the jury.

THEREFORE, Plaintiff respectfully requests that the directed verdict be reversed and this action be remanded for trial.

DATED this 15 day of May, 1996.

J. Angus Edwards
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Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of May, 1996, I caused four true and correct copies of the foregoing **BRIEF OF APPELLANT** to be served upon the following, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

John L. Young
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ADDENDUM

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ALTA HEALTH STRATEGIES, INC., a Delaware corporation, Plaintiff, vs. CCI MECHANICAL SERVICE, a Division of CCI Mechanical, Inc., a Utah corporation, Defendant.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DIRECTING VERDICT IN FAVOR OF DEFENDANT** Civil No. 930903151PP

The above-entitled matter came on for trial before the Honorable Leslie A. Lewis, on August 7, 1995, said matter being tried to a jury, duly chosen and seated in accordance with the Rules of Civil Procedure. The plaintiff, Alta Health Strategies was represented by J. Angus Edwards of Purser & Edwards; the defendant, CCI Mechanical Service was represented by John L. Young of Richards, Brandt, Miller & Nelson.

Upon the conclusion of the plaintiff's case on August 8, 1995, the defendant made a motion for directed verdict in favor of the defendant and against the plaintiff.

The Court, having considered the defendant's motion, the evidence presented by the plaintiff, the pleadings and the arguments of counsel, and being fully advised in the premises, hereby enters the following Findings of Fact, Conclusions of Law and Directed Verdict.

FINDINGS OF FACT

1. As of December 25, 1991, CCI Mechanical Service ["CCI"] was constructing and installing certain alterations on the air conditioning system and equipment at the Alta Health Strategies, Inc. ["Alta Health"] computer facility pursuant to a written contract.

2. On December 25, 1991, between the hour of 3:00 p.m. and 4:00 p.m., an event occurred at the Alta Health computer facility causing the air conditioning system to stop.

3. Russell Loudon, an employee of Alta Health, was the manager of the Computer Operations Center, charged with overseeing all computer operations for Alta Health. He entered the computer room sometime between 3:30 p.m. and 4:00 p.m., on December 25, 1991, and discovered that the temperature in the computer room had reached 95° fahrenheit.

4. Upon subsequent evaluation of the computer room equipment, Alta Health and Unisys, Inc., the computer equipment supplier and maintenance contractor, determined that five to seven head disk assemblies ["HDA's"] required replacement.

5. The HDA's requiring replacement were all associated with the Unisys Model 9494-24 unit.

6. The Model 9494-24 HDA's requiring replacement were not replaced by Alta Health and Unisys with the same model, but were replaced with new model 9730 Unisys units.

7. The quoted replacement cost by Unisys for the Unisys model 9494-24 HDA was $19,300.00 per unit.

8. The plaintiff failed to introduce any evidence as to whether the Unisys replacement price of $19,300.00 for each Model 9494-24 HDA was a "reasonable price."

9. In the transaction for replacement of the Model 9494-24 units with the new Unisys Model 9730 units, Unisys granted unspecified price concessions for the conversion to the new Model 9730 units.

10. The plaintiff produced no evidence as to the extent or amount of the price concessions given to Alta Health for the conversion to the Model 9730 units.

11. The plaintiff introduced no evidence establishing that Alta Health ever paid any amount for the replacement of the 9494-24 HDA's allegedly damaged on December 25, 1991, with the new Model 9730 units.

12. The plaintiff failed to introduce any evidence as to the age of the 9494-24 HDA's that were damaged on December 25, 1991; failed to establish the date that such HDA's were placed into service; failed to introduce any evidence that such HDA's were not exposed to environmental contamination, admittedly present in the Alta Health computer facility during the year 1991; and failed to introduce any evidence as to the fair market value of the Model 9494-24 HDA's immediately before the incident, that were replaced with the new Model 9730 Units.

13. The plaintiff failed to introduce any evidence as to the difference in fair market value between the Unisys Model 9494-24 HDA's damaged and the fair market value of the Model 9730 HDA's that replaced the 9494-24 HDA's.

14. The air conditioning system at the Alta Health Computer facility was not serviced by any auxiliary power supply. The sole power supply was from the main public utility service.

15. The Alta Health computer system was supplied with electrical power by the main public utility service and with an auxiliary "uninterrupted power supply" ["UPS"] system, which provided electrical power in the event of a main power supply failure.

16. As of December 25, 1991, Alta Health employees knew that the air conditioning system was not serviced by any alternative power source.

17. Prior to December 25, 1991, and subsequent to December 25, 1991, Alta Health manned the computer room facility 24-hours a day, seven days a week, 365 days a year.

18. Part of the work being performed by CCI at Alta Health as of December 25, 1991, included the modification and alteration of an "automatic switching system" that would allow the air conditioning system to automatically restart when the main electrical power was restored following a main electrical power outage. Russell Loudon and Kent Broadhead, Alta Health employees, knew that the air conditioning contract work being performed by CCI was incomplete on December 25, 1991.

19. Although Russell Loudon testified that he "understood" from a conversation with a CCI employee, either Greg Porter or George Murdoch, that the automatic switching system was operational as of December 25, 1991, he knew that the new electrical

control panel, with the air conditioning system indicator lights, was not installed. Prior to December 25, 1991, Russell Loudon did not inquire of any CCI employee regarding how the system would indicate that the automatic switching mechanism was working, or how the new system would work, or what the computer operators were to do regarding monitoring the new system, except that he knew there would be new indicator lights on the new electrical control panel when it was installed that would indicate which chillers were working.

20. The automatic switching system was not operational as of December 25, 1991.

21. Kent Broadhead and Russell Loudon decided to leave the Alta Health computer facility unmanned on December 25, 1991, with employees only periodically checking on the system.

22. Alta Health failed to introduce any evidence that Kent Broadhead had any conversations with any CCI employee to determine whether the automatic switching mechanism was operational as of December 25, 1991.

23. As of December 25, 1991, Kent Broadhead and Russell Loudon, employees of Alta Health, knew that in the event of a main electrical power outage, the computer system would be powered for 30-45 minutes by an alternative power source from the UPS system.

24. As of December 25, 1991, Kent Broadhead knew that in the event a main electrical power failure occurred and the UPS system power system was consumed, the multi-million dollar Alta Health Computer System would sustain a catastrophic failure.

25. Alta Health introduced no evidence to establish reasonable reliance to support its "understanding" that the automatic switch-over mechanism was complete as of December 25, 1991, or that such "understanding" could justify leaving the Alta Health Computer Center unattended on December 25, 1991.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court enters its conclusions of law.

1. The plaintiff failed to introduce sufficient evidence from which the jury could determine the damages, if any, that the plaintiff allegedly sustained.

2. The plaintiff failed to introduce sufficient evidence to allow the jury to find that the plaintiff had "reasonably relied" upon any negligent misrepresentation allegedly made by the defendant.

DIRECTED VERDICT

The Court, based upon the foregoing Findings of Fact and Conclusions of Law, hereby directs that a verdict be entered in favor of the defendant and against the plaintiff, no cause of action. The defendant is awarded its costs incurred herein, and shall submit an Affidavit of Costs, in accordance with the Utah Rules of Civil Procedure.

DATED this 3 day of November, 1995.

BY THE COURT:

/s/

HONORABLE LESLIE A. LEWIS
THIRD JUDICIAL DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was hand delivered, this 26 day of September, 1995, to the following:

J. Angus Edwards, Esq.
800 Parkside Tower
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Attorney for Plaintiff

Shawna Hurwood

69062